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No. 90-6704 (4)

Supreme Court, U.S.
FILE
OFFICE OF THE

IN THE SUPREME COURT OF THE UNITED STATES

October

DAVID

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Delaware uses a "Georgia" or "Gregg" type of procedure for determining who shall be sentenced to death after being convicted of first-degree murder. Under such a scheme, did it contravene either the First or the Eighth Amendment, for the sentencing jury to consider, as a factor in deciding whether death is the appropriate penalty, prosecution evidence that the defendant belonged to a "white racist prison gang" calling itself the "Aryan Brotherhood?"

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DAVID F. DAWSON,

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STATE OF DELAWARE,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

RESPONDENT'S BRIEF IN OPPOSITION

The State of Delaware, respondent, asks this Court to deny David Dawson's petition. In its opinion of October 4, 1990, the Delaware Supreme Court ruled that evidence of Dawson's membership in a prison gang called the "Aryan Brotherhood" had been properly put before his capital sentencing jury. Because that conclusion is consistent with the prior decisions of this Court, review here is not warranted. However, if the members of this Court believe that the question posed by this petition is a substantial one, or has not been definitively resolved by earlier decisions, the State asks that the Court grant this petition now in order to

prevent the issue from festering during the inevitable subsequent rounds of federal habeas corpus review.

OPINION BELOW

The opinion of the Delaware Supreme Court is now officially reported at 581 A.2d 1078 (Del. 1990). It is reproduced in the Appendix to the Petition for Certiorari at pages 1 through 71.

COUNTER-STATEMENT OF THE CASE

1. The Murder

On December 1, 1986, David Dawson was, as he had been almost all of his adult life, an inmate at the Delaware Correctional Center. That morning, Dawson and three other inmates escaped from the prison. Once outside, the group split up. The three other prisoners stole a car and fled north towards Wilmington; Dawson took another car and drove southward. Outside of the small rural community of Kenton, Dawson broke into a home and stole a leather jacket and several pocket watches. He then his attention to the home of Richard and Marie Kisner, just down the road. There, he surprised Mrs. Kisner as she was preparing to go to work. Dawson brutally murdered her. When her thirteen year old son returned home later that day after school, he found his mother's body in her bedroom. She had been bound with shoelaces, gagged with a sock, strangled, and repeatedly stabbed in the chest. Pet. App., Opinion ("Op.") at 4-8.

Still fleeing southward, but now with Mrs. Kisner's car, Dawson appeared later that evening outside a bar wearing the

leather jacket. Inside the bar, he gave a woman one of the watches taken during the first break-in. When he was finally apprehended a few hours later, Dawson was still wearing the stolen jacket, stained with Mrs. Kisner's blood and bearing fibers from her housecoat. Inside the coat's pocket was the match to the sock used to gag Mrs. Kisner along with other items taken during the two burglaries. Pet. App., Op. at 10-11.

2. The Trial

The subsequent indictment charged Dawson with first-degree murder under four separate counts. One count alleged that Dawson had intentionally killed Mrs. Kisner; a second charged that he had killed her during the course of an escape; and two others charged that he had killed her during the commission of the felonies of robbery and burglary. Del. Code Ann. tit. 11 § 636(a)(1), (a)(2), (a)(6), (a)(7) (1987).[1] At trial, the defense admitted that Dawson had been in the Kisners' house and had helped subdue Mrs. Kisner but suggested, as Dawson had offered to the police in a post-arrest statement, that the woman had been killed by the other three escapees when he had gone outside. The jury returned guilty verdicts on all of the charges including the four murder counts.

[1]Dawson was also charged with eleven other crimes arising from his spree after his escape from prison. Prior to trial, he pled guilty to the crimes of burglary and theft for the first break-in.

3. The Penalty Hearing

Before the trial had begun, Dawson had asked the trial court to keep the prosecution from introducing any evidence linking him with a prison gang known as the "Aryan Brotherhood." At that time, the trial court conditionally barred any evidence relating to the gang during the guilt-innocence phase of the proceedings. Pet. App., Op. at 13-15; Tr. A-23 (Pet. App. A77). After ne was convicted, Dawson renewed his application to preclude evidence about his association with the "Aryan Brotherhood." In addition, he asked the trial court to also prohibit any evidence indicating that he bore a large tattoo of the name "Abaddon" on his stomach or any evidence that he had used that moniker.

In response, the prosecution represented that during the upcoming penalty hearing it intended to introduce: (1) testimony, from an expert employed by the federal prison system, about the origin, nature, and central tenets of the "Aryan Brotherhood;" (2) photographs showing a tattoo with the words "Aryan Brotherhood" on Dawson's hand and other tattoos of swastikas on his back; (3) a photograph showing that Dawson had painted a large swastika on his prison cell; and (4) other articles found in Dawson's belongings which bore insignia of the "Aryan Brotherhood" and swastikas or which referred to "white supremacy." Tr. L-56 to L-63 (Pet. App. A82-86). The prosecutors admitted that they would be unable to show that Dawson had done anything unlawful while in prison in conjunction with his membership in the Aryan Brotherhood. However, they proposed that the proffered evidence was admissible to show "the

kind of thing [Dawson] ascribes to. That is his character." Tr. L-79 (Pet. App. A92). Similarly, the prosecution represented that it intended to put before the jury a photograph of Dawson's stomach tattoo as well as testimony that, after the murder, he had referred to himself as "Abaddon," explaining that the name meant "one of Satan's disciples." Tr. M-22. The defense argued that all of this evidence was both irrelevant and inflammatory and that, in particular, the introduction of the Aryan Brotherhood evidence, although it might admittedly provide "some clue" to Dawson's character, would allow the jury to punish Dawson for his beliefs contrary to the First Amendment. Tr. L-69 to L-82 (Pet. App. A87-94); Pet. App., Op. at 47-48. After extensive argument, the trial court ruled:

> The Court does find that membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America[] can be probative of character, at least to some extent. The real issue before the Court is whether the probative value is outweighed by the danger of unfair prejudice. So let's focus the argument that way.

Tr. M-83 (Pet. App. A95); Pet. App., Op. at 48. However, before the trial court could make its final ruling on admissibility of the evidence concerning the Aryan Brotherhood, the prosecution and defense reached an accord. Under the agreement, the prosecution could introduce the picture of Dawson's hand with the Aryan Brotherhood marking and the jurors would be told:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

Stipulation (Pet. App. A99); Pet. App., Op. at 48-49. Based on the stipulation, the trial judge ruled that any evidence showing swastikas could not be introduced. Turning to the evidence about "Abaddon," the trial court found that the proffered evidence was relevant and not unduly prejudicial. Tr. M-27; Pet. App., Op at 49-50.

When the penalty hearing began, the prosecution relied on the existence of three statutory aggravating circumstances - two of which the jury had already found by their prior guilty verdicts - to render Dawson prima facie eligible for the death penalty under Delaware's "Georgia-type" capital punishment statute.[2] Thus, in its evidentiary presentation, the prosecution concentrated on what it billed to the jurors as "non-statutory" aggravating circumstances. The presentation was three-pronged. First, the prosecution offered records detailing Dawson's long criminal history, including:

a. an initial commitment to a juvenile correctional facility at age thirteen;

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[2]The three statutory aggravating circumstances were: (1) the murder was committed by an escapee; (2) the murder was committed during the commission of a burglary or robbery; and (3) the murder was committed for pecuniary gain. Del. Code Ann. tit. 11, § 4209(e)(1)(a), (e)(1)(j), (e)(1)(o) (1987). Under the Delaware statute, the jury's earlier verdicts finding Dawson guilty of killing during the commission of a burglary and a robbery and in the course of an escape automatically established the first two of the above statutory aggravating circumstances. Del. Code Ann. tit. 11, § 4209(e)(2) (1987). In the court's charge to the jury at the end of the penalty hearing, the court told the jury to mark the special verdict interrogatory in accord with that statutory directive. Tr. N-79 to N-80.

b. five subsequent commitments to juvenile facilities from 1968 to 1973;

c. three escapes from maximum security juvenile facilities;

d. fourteen adult felony convictions, dating back to 1973, for crimes centering on thefts, escapes, and illegally possessing weapons;

e. three prior escapes from adult correctional supervision; and

f. twenty-four conduct violations while incarcerated.

Tr. M-40 to M-84; State's Exhs. 65-85; Pet. App., Op. at 51 & n. 25. Secondly, the prosecution, consistent with the prior agreement, introduced the picture of Dawson's right hand showing a tattoo with the name "Aryan Brotherhood" and read to the jury the stipulation describing the Brotherhood as a "white racist prison gang." State's Exhs. 86 & 87; Tr. M-100 to M-102; Pet. App., Op. at 48. The prosecution then completed its presentation by putting introducing the "Abaddon" evidence, starting with the picture of Dawson's stomach showing the tattoo. State's Exh. 88; Tr. M-104. At the same time, a police officer, relying on a dictionary, told the jury that the term was a biblical one, meaning "angel of the bottomless pit." Tr. M-108. And finally, the woman Dawson had met at the bar the evening after the murder testified that Dawson had introduced himself to her as "Abaddon" and had told her the name meant "one of Satan's disciples." Tr. M-96 to M-97; Pet. App., Op. at 49.

Although Dawson chose not to testify at the penalty hearing, the defense did counter with mitigating evidence. First, defense counsel, during his cross-examination of the prison records

clerk, elicited testimony that Dawson, during his earlier years in prison, had earned "quite a few" good time credits by enrolling in drug and alcohol treatment programs, by attending group counseling, and by working in prison industries. Tr. M-88. Secondly, Dawson's half-sister and aunt both told the jury that they still loved Dawson, despite all his prior crimes, and that they continued to visit him in prison each month. And lastly, Dawson's aunt recounted how Dawson had never known his father, how he had been raised primarily by his grandmother, and how he once had offered to donate one of his kidneys to save a dying niece. Tr. M-109 to M-118.

In their penalty hearing summation, the prosecutors focused on the statutory criteria of the "circumstances . . . of the offense" and the "character and propensities of the offender." Del. Code Ann. tit. 11 § 4209(d)(1)(b) (1987). When they turned to the latter, they integrated the evidence concerning Dawson's criminal record, his use of the name Abaddon, and his identification with the Aryan Brotherhood into a central theme that Dawson's "character" was incorrigible and that his whole life reflected a continued choice to reject any redeeming paths. Thus, after detailing the long history of his illegal conduct inside, as well as outside, of prison, one of the prosecutors told the jurors:

> . . . We introduced evidence to you, ladies and gentleman about other things which go directly to his character and propensities. The Aryan Brotherhood is a white racist prison gang. What does that tell you about David Dawson? It is not just a casual

association. He has branded himself with his tattoo Aryan Brotherhood.

Could have joined the JC's in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan brother. What does that say about his character and propensities?

Tr. N-37 (Pet. App. A97). Then, alluding to the "Abaddon" evidence, the prosecutor continued in the same vein:

He has taken the name Abaddon. We didn't tell you that because necessarily, or even for any religious reason, but it tells you something about what Abaddon means: The ang[el] of the bottomless pit, one of Satan's disciples. What does that say about how he views himself, how he would like to be seen by other people? What purpose could there be in calling himself the angel of the bottomless pit, Abaddon, other than to tell people you better watch out for me. I am bad.

This is not just a passing fancy, a fad, a phase in his life. It is a direction his life has turned. It is just not a nickname he goes by. He has marred his body with that tattoo: Abaddon. He is serious about this, ladies and gentlemen. All the way across his stomach A B A D D O N in block letters that high. He relishes that connotation, that impression of evil: the ang[el] of the bottomless pit.

Those are the non-statutory aggravating circumstances, ladies and gentlemen. Those are other reasons why - those are the character, they reflect the character, the propensities of David Francis Dawson. They tell you what type of person he is.

Tr. N-37 to N-38 (Pet. App. A97-98). And finally the prosecutor compared these circumstances to Dawson's evidence in mitigation:

How do those meritorious good time credits stack up against the bad conduct, the felony conviction? Where is going to AA compare with proclaiming yourself an Aryan brother? Where does abstinence of alcohol,

where does temperance range in his list of priorities compared to associating himself with a racist gang?

What does that tell you about the significance of those mitigating circumstances? Where do the few picnics at the prison, how do they weigh against his repeated escapes and his weapon charges in jail?

Where does the love of [a] half sister who sees him two or three times a month weigh against the real David Dawson who 7 days a week, 35 [sic] weeks a year is Aryan brother David Dawson, is Abaddon?

Tr. N-39. When he addressed the jury, defense counsel conceded that Dawson was an Aryan Brother and a white supremacist. Tr. N-51. But, alluding to "freedom of speech" and "freedom of thought," he cautioned the jurors that they should not give any weight to those facts, or similarly to Dawson's use of the name Abaddon, because the prosecution had not linked either his membership in the gang or his use of the name Abaddon to any harm or any disturbances while Dawson had been in prison. If they gave effect to such evidence, they would be sentencing Dawson to death because of what he believes. Tr. N-50 to N-53. He told the jury that the testimony about Dawson's prison jobs and program enrollment demonstrated that Dawson was "not just sitting in prison lying around doing nothing" but had made some "attempts to do certain things to at least improve his life." Tr. N-62. And if that evidence was not sufficient to warrant imprisonment rather than death, defense counsel suggested to the jurors that they should exercise mercy simply because there were people, such

as his aunt and half-sister, who still cared for Dawson. Tr. N-61 to N-62.

In rebuttal, the prosecutors again emphasized the purpose for introducing the Aryan Brotherhood and Abaddon evidence:

> And he accuses the State of having introduced inflammatory terms in this case: the Aryan Brotherhood and Abaddon. And he says well, if he has these thoughts, what's the harm?
>
> We are not required, ladies and gentlemen, to show there is another harm in the word Abaddon. It doesn't even make sense that there is. Obviously there isn't. If he wants to call himself Abaddon, fine. If he wants to join the Aryan Brotherhood, fine. If he wants to join the JC's, fine.
>
> You can bet if he joined the JC's you would heard about that in mitigation. You can bet if he joined the Kiwanis Club you would have heard about that in mitigation because it reflects upon the defendant's character. It tells us something about him.
>
> And what did Patty Dennis tell us about. It tells us something about the defendant that within 12 hours of this crime, of this brutal murder, he is describing himself to a complete stranger as one of Satan's disciples. It tells us something. Not that there is harm in it, but we are looking at the character of the defendant.

Tr. N-67.

After deliberating two hours, the jurors returned their verdict, reporting that they found the existence of all three statutory aggravating circumstances beyond a reasonable doubt and that they unanimously recommended that Dawson be sentenced to death. The trial court, bound by law to accept the recommendation, sentenced Dawson to die by lethal injection.

4. Appeal to the Delaware Supreme Court

Dawson appealed, arguing, as one of his challenges, that the the Aryan Brotherhood and Abaddon evidence should not have been permitted at the penalty hearing. The Delaware Supreme Court affirmed. It found that under Delaware's capital punishment scheme, the sentencing jury was permitted to consider a wide range of evidence, both in mitigation and aggravation, which relate to "all the specific circumstances of the crime and the defendant." Pet. App., Op. at 50 (internal quotation omitted). The court recognized that the main thrust of the prosecution's evidence during the penalty hearing was to show that Dawson's murder of Marie Kisner was in keeping with the incorrigible nature of his character. It found that under Delaware's scheme, the prosecution could offer the Abaddon and Aryan Brotherhood evidence to show that character. According to the court, Dawson's selection and use of the name Abaddon "was relevant to his character because it was a reflection of how Dawson viewed himself and how he wanted to be viewed." Pet. App., Op. at 52. So too, Dawson's decision to join a prison gang was also relevant to the issue of his character because his "affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others but again was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." Id.

After having found the evidence relevant, the court turned aside Dawson's contention that the use of this evidence violated the First Amendment. Adopting the rationale of the Pennsylvania

Supreme Court in rejecting a similar challenge, the Delaware court ruled "'[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing . . . evidence of [the defendant's] character [to be considered] where that character is a relevant inquiry.'" Pet. App., Op. at 54 (quoting Commonwealth v. Abu-Jamal, 555 A.2d 846, 859 (Pa. 1989), cert. denied, 111 S.Ct. 215 (1990)). Finding that the Aryan Brotherhood and Abaddon evidence had been presented in a manner "which did not shift the jury's attention away from the issue of Dawson's character," the court concluded that the admission of such evidence during the penalty hearing did not violate Dawson's constitutional rights. Pet. App., Op. at 56.

Finally, the Delaware Supreme Court also surveyed Dawson's death sentence under the state law requirement that it also determine whether, "considering the totality of the circumstances of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed . . . or disproportionate to the penalty imposed in similar cases . . . ." Del. Code Ann. tit. 11, § 4209(g)(2)(a) (1987). It concluded that "the weight of the statutory and non-statutory aggravating circumstances completely overwhelmed the mitigating circumstances." Pet. App., Op. at 66-67. In light of the fact that the record reflected "three statutory aggravating circumstances, significant non-statutory aggravating

circumstances, and virtually no evidence of mitigation," Pet. App., Op. at 68, Dawson's death sentence was neither arbitrary nor disproportionate.

REASON FOR DENYING THE PETITION

THE DECISION BELOW WAS CONSISTENT WITH THE PRIOR OPINIONS OF THIS COURT

The evidence at the penalty hearing clearly showed that David Dawson saw himself as a member of a "white racist prison gang" calling itself the "Aryan Brotherhood." The question presented by this petition is whether the capital sentencing jury, in deciding Dawson's fate, was entitled to consider that factor in making its "'reasoned moral response to the defendant's background, character, and crime.'" Penry v. Lynaugh, 109 S.Ct. 2934, 2947 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (concurring opinion)). The court below held that it was. According to the state court, Dawson's "membership in the Aryan Brotherhood, as well as the nature and origin of that group was relevant to Dawson's character[;]" his "affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others, but again was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." Pet. App., Op. at 52.

In contrast, Dawson now contends that the presentation of such evidence contravenes the federal constitution in two ways.[3]

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[3]In the state courts, Dawson also argued that his sentencing jury should not have been allowed to see his tattoo bearing the name "Abbadon" nor hear that he had used that name and described himself as "one of Satan's disciples" hours after his murder of Mrs. Kisner. Pet. App., Op. at 49-56. In this Court, Dawson does not press a challenge to that evidence.

First, he suggests that the constitutional imperative of "individualized" capital sentencing is a one-way mandate - allowing the defendant to offer his "positive" character traits and "redeeming" qualities in "mitigation" but barring the prosecution from offering any evidence of his less than admirable traits or the lack of any redeeming qualities. Pet. for Cert. at 17-19. Consequently, in this case, the Eighth Amendment precluded the prosecution from presenting the Aryan Brotherhood evidence as an aggravating circumstance. Secondly, he asserts that even if the prosecution can offer "character" evidence, that leeway does not extend to permitting the prosecution to offer evidence of the defendant's "beliefs" or "associations," such as mere membership in a racist prison gang, as indicia of his character. To do so, according to Dawson, would violate principles underlying the First Amendment and would allow a sentencing jury to decide a defendant's fate based on his beliefs. Pet. for Cert. at 20-22. The respondent believes that the prior opinions of this Court have rejected both of Dawson's challenges. Indeed, one need not look any further than the various opinions in Zant v. Stephens, 462 U.S. 862 (1983) and Barclay v. Florida, 463 U.S. 939 (1983) to turn back this petition.[4]

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[4]The Pennsylvania Supreme Court has also ruled that a defendant's membership in a group may be relevant "character" evidence in a capital sentencing penalty hearing. Commonwealth

(Footnote Continued)

1. Delaware's Capital Sentencing Statute

Delaware uses a "Georgia" or "Gregg"[5] procedure for determining when a convicted murderer should be sentenced to die. Flamer v. State, 490 A.2d 104, 134-36 (Del. 1983 and 1985), cert. denied, 464 U.S. 865 (1983) and 474 U.S. 865 (1985); State v. White, 395 A.2d 1082, 1085 (Del. 1978). Thus, the sentencing jury cannot impose the death sentence unless it first finds the existence of at least one of the listed statutory aggravating circumstances. Such a finding makes the defendant presumptively subject to the sentence of death. Del. Code Ann. tit. 11, § 4209(d)(1)(a), (e)(1) (1987). But even with such a finding, death cannot be imposed unless the jury also unanimously recommends such a sentence "after weighing all relevant evidence in aggravation or mitigation which bears upon the circumstances or details of the commission of the offense and the character and propensities of the offender." § 4209(d)(1)(b).[6] The sentencing scheme also envisions that in making the second determination,

(Footnote Continued)
v. Abu-Jamal, 555 A.2d 846, 858-59 (Pa. 1989), cert. denied, 111 S.Ct. 215 (1990). In contrast, one federal court of appeals, in a non-capital case, has held that the First Amendment bars using the defendant's membership in a group as an aggravating factor for sentencing purposes unless it is shown that the group has illegal aims and the defendant specifically intended to further those aims. United States v. Lemon, 723 F.2d 922, 936-41 (D.C. Cir. 1983).

[5]Gregg v. Georgia, 428 U.S. 153 (1976).

[6]Under the Delaware statute, the sentencing jury is not given any instructions about the weight of any "aggravating" and "mitigating" circumstances or how to perform any "weighing" process. In fact, typically, as happened in this case, the
(Footnote Continued)

the jury should "'have as much information before it as possible.'" Pet. App., Op. at 54 (quoting Gregg, 428 U.S. at 204 (plurality opinion)). At the penalty hearing, "evidence may be presented as to any matter that the [c]ourt deems relevant and admissible to the penalty to be imposed," encompassing "matters relating to any mitigating circumstances and to any aggravating circumstances, including, but not limited to," the listed statutory aggravating circumstances. § 4209(c)(1). Consequently, the prosecution is not confined to presenting evidence relating to the statutory aggravating circumstances. Riley v. State, 496 A.2d 997, 1022, 1023 (Del. 1985), cert. denied, 478 U.S. 1022 (1986). Instead, both the prosecution and defense may offer a wide range of evidence material to "all the specific circumstances of the crime and the defendant." White, 395 A.2d at 1089. See, e.g., DeShields v. State, 534 A.2d 630, 649 (Del. 1987) (defense offered "mitigating" evidence that accused was model prisoner, that relatives still loved him, and that he had had troubled youth), cert. denied, 486 U.S. 1017 (1988).

2. The Prosecution Can Present Aggravating "Character" Evidence

First of all, contrary to Dawson's assertion, the Eighth Amendment does not require that the states restrict evidence of a defendant's "character or background" to that which would point

(Footnote Continued)
jurors are told that their power to grant mercy is unconstrained and absolute: that "regardless of the circumstances, you in your discretion may recommend a sentence of life imprisonment." Pet. App., Op. at 62 n. 30.

towards "mitigation." Of course, this Court has repeatedly emphasized that the "fundamental respect for humanity underlying the Eighth Amendment . . . requires the consideration of the character and record of the individual offender and the circumstances of the particualar offense as a consitutionally indispensable part of the process of inflicting the death penalty." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion). See also Penry, 109 S.Ct. at 2947. But, this Court has never suggested that this "individualized" inquiry into the appropriateness of the sentence of death must be asymmetrical. Thus, eight years ago, this Court emphasized that nothing in the federal Constitution precludes the states from allowing the prosecution to present, for consideration by the sentencer, evidence of "aggravating" circumstances or factors beyond the criteria used by the legislature to narrow the class of those who are prima facie eligible to be sentenced to death. Zant v. Stephens, 462 U.S. 862, 868 (1983) ("But the Consitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among the class, those defendants who will actually be sentenced to death."). Nor must the states apply a narrower test of relevancy when the evidence is being proferred by the prosecution as an "aggravating factor" rather than by the defendant in "mitigation." Prosecution evidence can be "relevant" to the capital sentencing process if its value is to negate the existence of circumstances that otherwise might plausibly be offered as mitigating factors. Barclay v. Florida, 463 U.S. 939, 956 (1983) (plurality opinion);

id. at 970 (Stevens, J., concurring). For both the prosecution and the defense, the governing test of relevancy is whether the "information is relevant to the character of the defendant or the circumstances of the crime." Barclay, 463 U.S. at 967 (Stevens, J., concurring).

3. Dawson's Membership in a "White Racist Prison Gang" Was Relevant "Character" Evidence

Admittedly, this Court has never specifically defined the term "character" when used to describe evidence which is relevant to capital sentencing. Franklin v. Lynaugh, 487 U.S. 164, 178 (1988) (plurality opinion). But as Justice Scalia has recently said, the term has come to be seen - at least on the mitigation side - as any evidence which might be understood as "rendering the defendant less deserving of the death penalty" such as:

> that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood; that he had a great love for the victim's race, or that he had a pathological hatred for the victim's race; that he has limited mental capacity, or that he has a brilliant mind which can make a great contribution to society; that he was kind to his mother, or that he despised his mother.

Arizona v. Walton, 110 S.Ct. 3047, 3062 (1990) (Scalia, J., concurring). Clearly, the evidence deemed relevant to the individualized sentencing determination goes far beyond those factors associated with the traditional understanding of the terms "culpability" or "excuse." Skipper v. South Carolina, 476 U.S. 1, 4 (1986). Instead, the catchwords "character" and "background" are now taken to encompass any evidence which "tells the sentencer something about the defendant's personality."

Franklin, 487 U.S. at 190 (Stevens, J. dissenting). For example, relevant "character" evidence may include "evidence of honorable military service or kindness to those in the defendant's community or regular church attendance," id., or even testimony that the defendant, while in prison, won a prize for his dance choreography, Boyde v. California, 110 S.Ct. 1190, 1199 n. 5 (1990). That type of evidence, "may suggest that the conduct of which defendant stands convicted was not in keeping with his or her usual qualities or traits." Franklin, 478 U.S. at 190 (Stevens, J., dissenting). Or, it might suggest that his "character was not without some redeeming features," Franklin, 478 U.S. at 189 (Stevens, J. dissenting): that he still posesses "positive character traits that mitigate against the death penalty." Id. at 186 (O'Connor, J. concurring).

But, if it is "relevant" (and constitutionally required) for the sentencing jury to hear any evidence which might allow it to determine that the defendant's "criminal conduct was an aberration from otherwise good character," Boyde, 110 S.Ct. at 1199 n. 5, or that he has "virtues that can be fairly balanced against society's interest in killing him in retribution for his violent crime," Franklin, 487 U.S. at 189 (Stevens, J., dissenting), then it must be "relevant" for the sentencing jury to hear evidence, offered by the prosecution, that the defendant lacks counter-balancing redeeming qualities and that the crime for which he was convicted, rather then being an aberration, was consistent with his evil character.

As the court below recognized, the evidence offered by the prosecution pointing towards Dawson's membership in the prison gang called the Aryan Brotherhood fell well within these parameters for "character" evidence. First, the evidence was "relevant to show the appropriateness of the alternative punishment of imprisonment for him, another reflection of his character." Franklin, 487 U.S. at 190-91 (Stevens, J., dissenting). As the prosecutor explained to the jury (see infra at 8-10), Dawson's decision to join a prison gang was the counter-point to his participation in prison programs during his long years of incarceration. The jurors could infer from the fact that Dawson had had the gang's insignia tattooed on his body that his enthusiasm for the gang far outran his commitment to participating in rehabilitative prison programs. And against the backdrop of a history of escapes and instances of institutional misconduct, his decision to join a gang could be seen as one more indication of Dawson's consistent mindset to reject any meaningful attempt to rehabiliate himself. In addition, as set out more fully below, the evidence that the prison gang Dawson chose to join was a "racist" one tended to diminish any contention that Dawson had substantial "redeeming virtues" which might tilt the balance against sentencing him to die in retribution for his crime of killing Marie Kisner.[7]

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[7]Although Dawson does not here challenge in this Court the "Abaddon" evidence offered at the penalty hearing, it too fell within the common understanding of the scope of relevant
(Footnote Continued)

The introduction, by the prosecution, of evidence of Dawson's association with the prison gang called the Aryan Brotherhood did not offend the Eighth Amendment.

4. Introduction of the Aryan Brotherhood Evidence Did Not Contravene the First Amendment

Dawson's second argument is that the introduction of the Aryan Brotherhood evidence also contravened values underlying the First Amendment. Ironically, on this question the State and Dawson start on common ground. Both agree that a person's choice to associate with a particular group, much like the expression of one's views or beliefs (or indeed like any other voluntary conduct), does indeed communicate something about a person's personality or "character." But Dawson argues that once the prosecution offered evidence that Dawson is a member of a "white racist" gang and then used that association as indicia of his "character," the door was opened for the capital sentencing jurors to sentence Dawson to die simply because they found his "white suprmacist" beliefs morally abhorrent. To Dawson, that result - where the decision about life or death may rest upon the jurors' evaluation of the moral "rightness" or "wrongness" of Dawson's beliefs - constitutes impermissible "content

(Footnote Continued)
"character" evidence. Evidence that Dawson described himself as "Abaddon" - "one of Satan's disciples" - within hours after his murder crime and had earlier had that name branded onto his body was surely probative of whether Dawson, himself, saw his murder of Madeline Kisner as an act inconsistent with his usual qualities or traits.

discrimination" by the government inimical to the concept of "freedom of expression."

Dawson's First Amendment thrust misses its mark. First, neither Dawson's belief in "white supremacy" nor his membership in the "white racist prison gang" called the Aryan Brotherhood was the basis for the death sentence. Rather, Dawson was eligible to be sentenced to death because the jurors found him guilty of first-degree murder and then also found the existence of three statutory aggravating circumstances. It was those findings alone which announced "the community's belief that [the crime was] so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg, 428 U.S. at 184 (plurality opinion). Rather the evidence concerning Dawson's membership in the Aryan Brotherhood (and indeed the evidence concerning his use of the name Abaddon) became a relevant factor when the jury was then called upon to decide whether to forego exacting the retributive sanction. The difference is crucial. Thus, it may well be that the communal sense of tolerance implicit in the First Amendment bars legislatures from making the possession of a particular belief or the exercise of other constitutionally protected self-expressive activity a "threshold" statutory aggravating circumstance. Stephens, 462 U.S. at 885. Cf. Brandenburg v. Ohio, 395 U.S. 444, 446-49 & n. 1 (1969) (per curiam) (state may not criminalize expression of racist views). But a capital sentencing scheme need not be so "value" or "content" neutral at the stage where

the sentencing jury is called upon to determine whether to forego retribution and exercise leniency or mercy.

Indeed, this Court has just recently once again emphasized that this second determination should "reflect a reasoned moral response" by the sentencing jury. Penry, 109 S.Ct. at 2947. But if that is so - if "the individualized assesement of the appropriateness of the death penalty is a moral inquiry," California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), - then "[i]t is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." Barclay, 463 U.S. at 950 (plurality opinion).

In fact, in his concurring opinion in Barclay, Justice Stevens seemingly rejected the challenge Dawson makes here. Barclay had joined with three others to form a group, styled the Black Liberation Army. The shared tenets of the small group were hatred of white people and the need for a liberating racial war. To trigger such a clash, the members of the group kidnapped and killed a young hitchiker. In sentencing Barclay to die for this murder, the Florida sentencing judge had relied on his own abhorrence to the ideas of racial hatred and the need for a race war, indicating that he thought that anyone who chose to initiate such a diabolical course should be permanently removed from society by execution. 463 U.S. at 948 n. 6 (reproducing trial judge's findings). However, as Justice Stevens correctly surmised, "killing out of racial hatred" was not encompassed within any of Florida's statutory aggravating circumstances. See

State v. Barclay, 470 So.2d 691, 694-95 (Fla. 1985). Thus, the judge's deeply felt concern about racial crimes "had no bearing on any statutory aggravating cirmcumstance." Barclay, 463 U.S. at 970 (Stevens, J., dissenting). But, in Justice Stevens' view, that fact did not necessarily make Barclay's sentence illegitimate. Rather, the judge's reactions to Barclay's beliefs were valid considerations in the third stage of the Florida sentencing procedure, the stage when the sentencer had to exercise its discretion and determine if death was the appropriate penalty. Id. at 970 n. 18 (Stevens, J., concurring). At that stage, "[t]he sentencing process assumes that the trier of fact will exercise judgment in light of his or her background, experiences, and values." Id.[8]

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[8]Of course, in Barclay, the defendant's views and beliefs in "racial hatred" had not been communicated simply by abstract expressions. They had been the motive for the murder he committed. But because "racial hatred" was not a statutory aggravating circumstance in Florida, when the sentencing judge condemned Barclay to die he was still, for traditional First Amendment analytical purposes, imposing a "penalty" on Barclay for holding those beliefs. As Professor Tribe has explained using an analogous hypothetical:

> To be sure, one who incites arson against an NAACP headquarters in a racist speech is more reprehensible than one who incites the very same arson to collect insurance proceeds, but to punish the former more severely than the latter is, arguably, to penalize a reprehensible viewpoint as such.

L. Tribe, American Constitutional Law § 12-17 at 926 (2nd. ed. 1988). In light of this, Dawson cannot distinguish his argument from the one rejected by Justice Stevens in Barclay simply on the basis that he had not acted on his racist beliefs.

That theme echoes throughout all of this Court's opinions requiring "individualized" sentencing determinations. For example, as noted above, it has been generally assumed that a capital defendant is constitutionally entitled to put before the sentencing jury evidence of his "regular church attendance." Franklin, 487 U.S. at 190 (Stevens, J., dissenting). He is entitled to do so because the sentencer may see such conduct as a "positive character trait," id. at 186 (O'Connor J., concurring), which might cause it to exercise leniency. As one commentator has noted, such type of evidence is relevant because, from such such testimony, the jurors may "see so much of the normal or good in the killer that they can rationalize his crime as an aberration." Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 305, 391. Yet, in order to draw that inference the jurors must necessarily make judgments in light of their perceptions of "community values." They must see religous devotion as something of sufficient "good," "redeeming" or "moral" value to tilt against retribution. And, of course, if they so conclude, and decide to spare the defendant's life on that basis, they are, in effect, "penalizing" those capital defendants who may have rejected religion and thus cannot offer evidence of religious devotion. In sum, what the prior opinions of this Court demonstrate is that the traditional First Amendment constraints against governmental viewpoint discrimination are not applicable when a capital sentencing jury is called upon to make the "reasoned moral response" whether "an individual has lost his

moral entitlement to live." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

Of course, even at this stage of capital sentencing, there are constraints on what may be considered relevant character evidence. If at this phase the sentencing jury acts as the communal moral voice of the community, then only those "values" upon which there is a broad community consensus can qualify for consideration by that jury. But this Court need not explore the extremes of those constraints in this case. There is a broad societal consensus that the doctrines of racism and "racial" supremacy are morally wrong. Cf. Beauharnais v. Illinois, 343 U.S. 250, 263-66 (1952) (suggesting speech promoting racial or religuous hatred is unprotected). Thus, while First Amendment values may estop us from banning the expression of racist beliefs, we need not endorse those who hold such views. See, e.g., Collin v. Smith, 578 F.2d 1197, 1200, 1203 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

Here, the First Amendment did not bar introduction of the evidence of Dawson's membership in the Aryan Brotherhood.

CONCLUSION

For the above reasons, the respondent, State of Delaware, asks the Court to deny Dawson's petition for certiorari.

Respectfully submitted,

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